BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DEBRA K. DETERS-GALLOWAY Claimant	)	
V.	)	Docket No. 1,058,349
KANSAS REHABILITATION HOSPITAL Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Self-insured respondent requested review of the preliminary hearing Order entered by Administrative Law Judge (ALJ) Rebecca A. Sanders. Jan. L. Fisher of Topeka, Kansas, appeared for claimant. Ryan D. Weltz of Overland Park, Kansas, appeared for respondent.

The ALJ found claimant entitled to medical treatment and designated Dr. Joseph Sankoorikal as the authorized treating physician. The ALJ further ordered temporary total disability (TTD) compensation beginning March 3, 2016.

This post-award matter was filed as a preliminary hearing, with no objection from respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the July 12, 2016, Preliminary Hearing and the exhibits; the transcript of the June 26, 2012, Preliminary Hearing and the exhibits; the transcript of the July 11, 2013, Regular Hearing; the transcript of the August 9, 2013, evidentiary deposition of Dr. Pedro A. Murati and the exhibits; and the transcript of the August 29, 2013, deposition of Dr. J. Clinton Walker and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues claimant's October 11, 2011, work-related accident is not the prevailing factor for her current low back condition. Respondent maintains claimant's current condition is related to degenerative changes and is therefore not compensable.

Claimant contends the Board lacks jurisdiction to review respondent's appeal. Further, claimant argues respondent's appeal is barred by *res judicata* because the permanency of her complaints was previously decided in the underlying Award. Claimant

argues her current need for medical treatment and TTD benefits is a natural and probable result of her original work-related injury.

The issues for the Board's review are:

1. Does the Board have jurisdiction to review respondent's appeal?

2. Is respondent's appeal barred by *res judicata*?

3. What is the prevailing factor for claimant's current condition?

FINDINGS OF FACT

Claimant worked for respondent as an LPN when she met with personal injury by accident on October 11, 2011. On October 11, 2013, claimant was awarded workers compensation benefits based upon an eight percent permanent partial impairment to the body as a whole, related to injuries to her low back and left upper extremity. Claimant continued working for respondent as an LPN with some self-accommodation.

Claimant testified her low back pain began to worsen over time. Claimant explained she gradually increased her prescription pain medication dosage in addition to taking over-the-counter pain medication because her pain became constant. She began resting more between patients and asking for help at work in order to perform her duties. Claimant testified the culmination of her pain caused her to request medical treatment from respondent on or about October 27, 2015.

Respondent sent claimant to Dr. Dale Garrett on November 3, 2015. Claimant complained of a "lower back pain flare up" with no known re-injury.[1] Claimant followed up with Dr. Garrett, but explained she was not provided treatment, only medications and restrictions. Dr. Garrett restricted claimant to no prolonged sitting, walking, or repetitive bending at the waist. He limited claimant to no lifting, pushing or pulling greater than 15 pounds. Dr. Garrett opined claimant's current complaints were "directly traceable" to her prior work-related injury.[2]

Claimant stated respondent would not accommodate her restrictions and her last day worked was November 2, 2015. Claimant testified she continues to consider herself an employee of respondent because she was never notified otherwise.

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[1] P.H. Trans. (July 12, 2016), Cl. Ex. 1 at 2.

[2] *Id*. at 8.

Claimant has a history of low back complaints predating the 2011 work-related injury. Claimant testified she was not limited in her activities by these complaints until after her fall in October 2011.

On October 11, 2013, the ALJ awarded claimant compensation that included a five percent impairment to claimant's low back for the October 11, 2011, injury by accident. The ALJ concluded claimant's low back condition arose out of and in the course of her employment with respondent based upon the testimony and written reports of Dr. Pedro Murati and the written report of the court-ordered examiner, Dr. Edward Prostic.

Dr. Murati diagnosed low back pain with radiculopathy and right SI joint dysfunction. Dr. Murati noted preexisting degenerative disc disease throughout the thoracic spine in his December 13, 2011, report.[3] In his October 23, 2012, report, Dr. Murati noted a less than 25 percent compression fracture at T7 or T8.[4] In his January 4, 2012, letter, Dr. Murati commented on x-rays taken prior to claimant's accident that showed moderate degenerative changes at L5-S1 and mild degenerative changes everywhere else in the lumbar spine.[5]

Dr. Prostic assessed an impairment for pain, with no specific diagnosis. In his August 7, 2012, report, Dr. Prostic noted severe disc space narrowing at L5-S1, posterior osteophytes at L4-5, and squaring at the three lower lumbar vertebrae.[6]

Claimant remained off work and received TTD payments from respondent until March 3, 2016, when she saw Dr. Alexander Bailey. Claimant complained of ongoing progression of her low back pain, with pain into her hips and legs. Dr. Bailey reviewed claimant's history and medical records, including those related to back conditions dating back to March 2000. Dr. Bailey reviewed x-rays, an MRI taken in December 2015, and performed a physical examination. He provided the following diagnoses: severe degenerative disc disease multilevel lumbar spine L2 through the sacrum; low-grade spondylolisthesis and dramatic degenerative disc disease L4-5, and L5-S1; bilateral hip pain, bilateral shoulder pain, and bilateral neck and arm pain, numbness and tingling.[7] Dr. Bailey determined:

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[3] See Murati Depo., Ex. 2.

[4] See Murati Depo., Ex. 4 at 4.

[5] See Murati Depo., Ex. 3 at 1.

[6] See Prostic Report (Aug. 7, 2012) at 3.

[7] See P.H. Trans. (July 12, 2016), Resp. Ex. C at 4.

> Given the multifocal nature of her degeneration, osteoarthrosis, varying degrees of foraminal stenosis, bony overgrowth, facet changes is pathognomonic for a degenerative condition. This is not a traumatic finding nor can I relate it to 2011. It is my opinion the prevailing factor throughout this entire case even previous to 2011 is the degenerative condition. . . . I would indicate the max that I would assign to a fall related condition in 2011 would be a strain and sprain and otherwise has degenerative findings. . . . It is my opinion the prevailing factor is a personal medical condition and not related to her work injury of 2011.[8]

Dr. Murati examined claimant on April 21, 2016, at claimant's counsel's request. Claimant complained of constant low back pain shooting into both legs, numbness and sensation in both thighs, difficulty sleeping due to low back pain, increased low back pain with bending, and noted she must alternate sitting, standing, and walking due to low back pain. Dr. Murati reviewed claimant's history, medical records, and performed a physical examination. He indicated claimant sustained an aggravation of low back pain with signs of radiculopathy and bilateral SI joint dysfunction. Dr. Murati provided restrictions and recommended conservative treatment. He wrote:

> This claimant's current diagnoses are within all reasonable medical probability a direct result from the original work-related injury that occurred on 10-11-11 during her employment with [respondent].[9]

Claimant testified she continues to have pain affecting her daily activities on a nearly constant basis. Claimant currently receives Social Security disability benefits.

Based upon a review of Division records, claimant suffered a work-related injury by accident to her low and mid back while lifting a patient on June 16, 2012. The injury resulted in a separately docketed claim, Docket No. 1061430, which was dismissed by joint stipulation on August 1, 2016.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b(c) states:

> The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

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[8] *Id.* at 11.

[9] P.H. Trans. (July 12, 2016), Cl. Ex. 2 at 6.

K.S.A. 2011 Supp. 44-508(h) states:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-508(f) states, in part:

> (2)(B) An injury by accident shall be deemed to arise out of employment only if:
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> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
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> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2011 Supp. 44-508(g) states:

> "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Not every alleged error in law or fact is subject to review. On an appeal from a preliminary hearing Order, the Board can review only allegations that the judge exceeded his or her jurisdiction under K.S.A. 2015 Supp. 44-551 and jurisdictional issues listed in K.S.A. 2015 Supp. 44-534a(a)(2), which are: (1) did the worker sustain an accident, repetitive trauma or resulting injury; (2) did the injury arise out of and in the course of employment; (3) did the worker provide timely notice; and (4) do certain other defenses apply. "Certain defenses" refer to defenses which dispute the compensability of the injury of the injury.[10]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted

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[10] See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

[11] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

by K.S.A. 2015 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[12]

ANALYSIS

Res judicata forecloses "a finding of a past fact which existed at the time of the original hearing."[13] A "workers'-compensation award is in most respects like a court judgment and subject to *res judicata*: issues necessarily decided in determining the award may not be relitigated unless specifically provided for by statute."[14]

In its brief, respondent stated "[t]he question is simply whether the current complaints are from the work accident or from earlier causes,"[15] or in other words, claimant's current need for treatment is related to a preexisting condition that existed prior to her compensable work-related accident. This is respondent's sole defense. The issue was addressed and decided by the ALJ in her award of disability compensation and future medical treatment. No appeal was taken from the ALJ's Award. As such, claimant's condition as it existed at the time of the Award is compensable.

Dr. Bailey was clear his opinion was that claimant's low back condition was preexisting prior to 2011, and he did not think the low back injury should have been compensable. Dr. Bailey's conclusions are inconsistent with the ALJ's initial award of medical compensation for claimant's preexisting degenerative condition.

The issue of whether claimant's current need for medical treatment is related to a preexisting condition has already been litigated and is barred by *res judicata*. As respondent's preexisting condition defense is barred, no issue appealable under K.S.A. 44-534a has been raised.

CONCLUSION

The Board does not have jurisdiction to review respondent's appeal.

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[12] K.S.A. 2015 Supp. 44-555c(j).

[13] *Moody v. KBW Oil & Gas Company*, No. 1,061,663, 2016 WL 3208228 (Kan. WCAB May 12, 2016), citing *Randall v. Pepsi-Cola Bottling Co., Inc.*, 212 Kan. 392, 396, 510 P.2d 1190 (1973). See also *Bazil v. Detroit Diesel Cent. Remanufacturing,* No. 99,613, 2008 WL 5401467 (Kansas Court of Appeals unpublished opinion filed Dec. 19, 2008).

[14] *Scheidt v. Teakwood Cabinet & Fixture, Inc.*, 42 Kan. App. 2d 259, 261, 211 P.3d 175 (2009). See also *Hughes v. State*, No. 107,108, 2012 WL 3290020 (Kansas Court of Appeals unpublished opinion filed Aug. 10, 2012); *Omar v. Tyson Fresh Meats, Inc.*, No. 106,408, 2012 WL 1920700 (Kansas Court of Appeals unpublished opinion filed May 18, 2012).

[15] Resp. Brief at 9.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that respondent's appeal of the July 12, 2016 preliminary order is dismissed.

IT IS SO ORDERED.

Dated this _____ day of September, 2016.

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HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Hon. Rebecca A. Sanders, Administrative Law Judge